1989

Erickson v. Misaka : Petition for Writ of Certiorari

Utah Supreme Court

Randy S. Ludlow; attorney for repsondent.
Herschel J. Saperstein, Ken P. Jones; Watkiss & Campbell; attorneys for petitioner.

IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of ROBERT E. ERICKSON, Deceased, Respondent, vs. TATSUMI MISAKA, Petitioner.	Supreme Court No. 890110 Court of Appeals No. 880139-CA

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the Matter of the Estate of ROBERT E. ERICKSON, Deceased,	)	
Respondent,	)	Supreme Court No. _____
vs.	)	Court of Appeals No. 880139-CA
TATSUMI MISAKA,	)	
Petitioner.	)	

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the holographic document which is entirely in decedent's handwriting and contains the decedent's handwritten name in the body of the document satisfy the holographic will requirements of Utah Code Ann. §75-2-503, including the requirement that the holographic will contain the Decedent's "signature?"

2. Was the issue of whether or not the holographic document contained the decedent's signature properly before the Court of Appeals?

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Decision of the Utah Court of Appeals in this matter is reported in Estate of Erickson v. Misaka, 766 P.2d 1085 (Utah App. 1988) and 98 Utah Adv. Rep. 64 (Ct. App. Dec. 23, 1988).

STATEMENT OF JURISDICTION

1. The Decision of the Utah Court of Appeals of which review is sought was entered on December 23, 1988.

2. The Court of Appeals' Order Denying Rehearing was entered on January 26, 1989. An Order granting an extension of time within which to petition for writ of certiorari until March 27, 1989 was entered by this Court on February 23, 1989.

3. The statutory provision conferring the Utah Supreme Court with jurisdiction to review the Decision in question by a Writ of Certiorari is Utah Code Ann. §78-2-2(3)(a) (Supp. 1988).

CONTROLLING STATUTES

Utah Code Ann. §75-2-503 (1978). Holographic Will:

> A will which does not comply with section 75-2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator. If there are several holographic wills in existence with conflicting provisions, the holographic will which is established by date or other circumstances to be the will that was last executed shall control. If it is impossible to determine which will was last executed, the consistent provisions of the several wills shall be considered valid and the inconsistent provisions shall be considered invalid.

STATEMENT OF THE CASE

Nature of the Case

This case is a formal petition for the probate of a handwritten document consisting of three cards as the holographic will of Robert E. Erickson, the Decedent. The holographic document was admitted to probate by the Third District Court, Salt Lake County, the Honorable John A. Rokich presiding. On appeal, the Utah State Court of Appeals reversed the trial court, finding that the holographic document did not meet the requirements of Utah Code Ann. §75-2-503 to qualify as a holographic will.

Statement of the Facts

Robert E. Erickson ("decedent") died on June 16, 1983. A will dated June 9, 1955 was admitted to probate and First Interstate Bank, N.A., was appointed as personal representative of the estate. (R. 19-22, 26-27). The personal representative of the

estate is the respondent in this matter. Tatsumi Misaka, the petitioner herein, filed a petition (R. 70-81) seeking the probate of a holographic document consisting of three 3" x 5" cards, which were discovered among the effects of the decedent following the probate of the prior will (R. 84).

The holographic document, a copy of which is located in the Appendix, begins as follows:

Last Will & Test

> I Robert E. Erickson do hereby state that I leave and bequeath to the following persons of my family and others....

Approximately two-thirds of the way down the first card, in the middle of a sentence, the writing changes from blue to black ink. The remainder of the first card and all of the second and third cards are written in the black ink. Additionally, the underlined date "8/22/73" was subsequently added to the upper right hand corner of the first card, as shown by the underlined date being in black ink and partially covering the letter "L" at the beginning of the words "Last Will & Test." (3-P).

Under the holographic document, Mr. Misaka is the beneficiary of a one-half interest in a Park City condominium and is noted as the owner of a one-fourth interest in the "F. H. Store." (3-P). Mr. Misaka and the decedent were co-investors and partners prior to decedent's death (R. 131), and Mr. Misaka had filed a claim against the estate for an interest in the Park City condominium and other properties based on the business association between Mr. Misaka and decedent (R. 75-81), which claim was denied by the

personal representative. The personal representative objected to the probate of the holographic document (R. 82-83).

At trial, the holographic document was received into evidence and Mr. Misaka presented expert testimony that the entire holographic document, which includes the name of the decedent in the body of the document, was in the decedent's handwriting. (R. 143). The personal representative presented evidence regarding the physical form of the handwritten name of decedent, testamentary intent, and testamentary capacity. Following the trial, the Court rejected the Findings of Fact and Conclusions of Law and the Order submitted by the Personal Representative (R. 112-119), accepted the Findings of Facts and Conclusions of Law (R. 122-125) submitted by Mr. Misaka, and entered an Order admitting the holographic document to probate as the will of the decedent. (R. 121-122).

On appeal to the Utah Court of Appeals, the personal representative raised two points: Point I, "There was no testamentar intent to have the cards made as the holographic will of th decedent," and Point II, "The nature of the cards themselves fa to establish a testamentary disposition of the property of t decedent." The Court of Appeals reversed the trial court decision on a third issue, finding that Mr. Misaka had failed prove that the decedent intended that his handwritten name in t body of the holographic document be his "signature," and therefc that Mr. Misaka had failed to meet his burden of establish

prima facia proof that the holographic document contained the decedent's signature as required by Utah Code Ann. §75-2-503.

ARGUMENT

POINT I

THIS COURT SHOULD EXERCISE ITS POWERS OF SUPERVISION BECAUSE THE COURT OF APPEALS' DECISION IMPROPERLY DECIDES THE CASE

A. MR. MISAKA MET HIS BURDEN OF PROOF THAT THE HOLOGRAPHIC DOCUMENT CONTAINS THE DECEDENT'S SIGNATURE.

1. The Language In The Holographic Document Establishes The Decedent's Intent That His Handwritten Name Be His Signature.

Title 75 of the Utah Code Ann. is the Utah Uniform Probate Code, which adopted the Uniform Probate Code for the State of Utah. See 1975 Laws of Utah, Ch. 150. The execution requirements for wills under the Utah Uniform Probate Code ("UUPC") are set forth in Utah Code Ann. §§75-2-502 and -503 (1978). Those sections provide in relevant part as follows: "Except as provided for holographic wills, ... every will shall be in writing signed by the testator ... and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgement of the signature or of the will." Utah Code Ann. §75-2-502 (1978). Utah Code Ann. §75-2-503 (1978) provides an exception to those execution requirements for holographic wills: "A will which does not comply with Section 75-2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator."

Neither §75-2-502 nor -503 requires that the testator's signature appear at the end of the will; in fact, the official comments to the Uniform Probate Code specifically refute such a requirement:

> There is no requirement that the testator's signature be at the end of the will; thus, if he writes his name in the body of the will and intends it to be his signature, this would satisfy the statute. The intent is to validate wills that meet the minimum formalities of the statute.

Editorial Board Comment to Section 2-502 of the Uniform Probate Code.

The requirement of a signature under Utah Code Ann. §75-2-503 could be used to accomplish a variety of purposes, not all of which are consistent with the existing legislative intent to allow a will to be signed in the body of the document. The signature requirement could act to identify the testator and to prevent fraud due to the difficulty of forging a signature. The signature requirement could further act to show the testator's understanding of the importance and legal significance which accompanies a will and that the testator intends the document, whether or no presently completed, to be his will. Finally, the signatur requirement could act to show the finality of the instrument c to protect against deletions of portions of the will.

In its Opinion in this case, the Court of Appeals interpret the signature requirement of the Utah statute as including t purpose of showing the finality of the will:

> "The purpose of our statutory scheme is to require a course of conduct which assures that

> a person's will is reduced to handwriting, and when handwritten, that the intention is to have the writing take legal effect be indicated by a signature which records the fact. The signature requirement shows that the writer finally approved the writing and meant for it to be operative as a testamentary instrument."

Estate of Erickson v. Misaka, 766 P.2d 1085, 1088 (Utah App. 1988).

The Court of Appeal's interpretation would be consistent with a statute requiring that a will be signed at the end, but is inconsistent with the UUPC and the Editorial Board Comment to Section 2-502 of the Uniform Probate Code which allow a signature in the body of the will. In allowing wills to be signed in the body, the UUPC implicitly rejects the possible purpose that the signature act to show the finality of a will. A will which is signed in the body is necessarily signed before the written language of the will is complete. Thus, the "signature" requirement of Utah Code Ann. §75-2-503 should not be construed to mean that the handwritten name must be placed on the will to show a final approval of the completed document. Imposing a requirement of a specific intent that the handwritten name in the body of the will be put there for the purpose of authenticating the completed will defeats the legislative intent of allowing a will to be signed in the body, and also defeats the broad purpose of the Uniform Probate Code to "validate wills whenever possible." General Comment to Part 5, Editorial Board Comment of the Uniform Probate Code.

The Opinion of the Court of Appeals implies further that the signature requirement under the UUPC is also intended to protect against deletions. "Without more, it is an inadequate guard against writing being deleted..." Erickson, 766 P.2d at 1088. Again, such a purpose is consistent only with a will statute requiring a signature at the end. The intent of the UUPC to allow a will to be signed in the body implicitly indicates that the purposes for the signature requirement do not include safeguarding the will against deletions, because a signature in the body of the will does not serve to indicate an absolute ending, as a signature at the end would.

While the Utah statute does not support a requirement that the signature act to show finality or to guard against deletions, the Editorial Board Comment to Section 2-502 provides that the testator's handwritten name in the body of the will should be intended to be a "signature," indicating that more is required than just a name in the body of the will. This Court should find that the purpose of the signature requirement under the UUPC is to show the testator's understanding of the legal significance of the act he is undertaking, that is, the act of making a will. The signature requirement should be construed to validate wills containing the testator's handwritten name in the body of the will in a context which demonstrates the testator's operative intent for the language to follow, showing the testator's understanding of the importance and legal significance of the document being prepared, and thus authenticating the will.

The Court of Appeals has improperly given no weight to the language immediately surrounding the Testator's handwritten name in the exordium clause. The language "I Robert E. Erickson do hereby state that I leave and bequeath..." immediately underneath the title "Last Will & Test," shows clear operative intent that the document he was preparing serve as his will. The Testator could hardly have expressed his intent more clearly. The language "do hereby state" shows the intent of the Testator to validate the will with the handwritten name which immediately precedes those words.

The courts in other states have recognized a handwritten name in an exordium clause to be evidence of an intent to validate or authenticate the will by placing the name in that context. In Smith v. McDonald, 252 Ark. 931, 481 S.W.2d 741 (1972) the court validated the will which began "I, Julian Leland Rutherford...do hereby make, publish and declare this to be my last will and testament..." The same court, in Nelson v. Texarkana Historical Soc'y and Museum, 257 Ark. 931, 481 S.W.2d 882 (1972) found the signature requirement not met where the testator's handwritten name only appeared in the context of stating that certain property was given in memory of the testator. The California Supreme Court has adopted a standard even broader than the proposed standard, finding that intent to sign can be shown by the handwritten name of the testator in the phrase "Bonds belonging solely to Helene I. Bloch." In re Bloch's Estate, 39 Cal.2d 570, 248 P.2d 21 (1952). Two of the cases cited by the Court of Appeals in

Footnote 3 of its Opinion to support the court's statement that in proper circumstances a handwritten name in the body of the will could be written with the intent to be a signature actually support the probate of the present holographic document. Those cases found handwritten names in the body of the wills to be signatures based solely on language in the will, similar to the language in the present holographic document, supporting the testator's operative intent for the document. See In re Estate of Glass, 165 Cal. App.2d 380, 331 P.2d 1045 (1958) (signature requirement met where will provided "This is Louis R. Glass I wish to Retract my last Will witch I left my sister Ester Glass now Mrss Zipkin & give my belongings to my Three Nefeu & Nice....") and Burton v. Bell, 380 S.W.2d 561 (Tex. 1964) (signature requirement met by exordium clause which provided "That I, Roy Wheeler Bell, of Harris Co. Tex being of sound disposing minc memory, do hereby make this my last will & testament, hereby revoking any & all other wills heretofore made by me"). In In r Estate of Fegley, 42 Colo. App. 47, 589 P.2d 80 (1978), the cour addressed the question of whether the testator's signature i required at the end of a will under Colorado's version of th Uniform Probate Code, which contains a holographic will provisic identical to the relevant portion of Utah Code Ann. §75-2-50 The court held that "the intent of the testator -- not t location of his name -- is the crucial factor in determini whether a holographic will has been signed within the meaning [the Colorado holographic will statute]." Id. at 81. The co

determined that the testator lacked the necessary testamentary intent that a will have immediate effect because the holographic document contained the phrase "witness my hand...," followed by a blank signature space and an attestation clause, which the court saw as indicating that the testator intended to sign the will at a later date, and that the testator did not intend her name in the body of the will to be her signature. The conclusion of the court in Fegley is consistent with the proposed standard because the format of the will, containing a blank signature space followed by an attestation clause, indicated that the testator intended to take further action to validate the will.

Finding that a will contains a signature in situations which demonstrate the testator's operative intent for the language to follow is not contrary to the general statutory definition of "signature" contained in Utah Code Ann. §68-3-12(2)(r) (Supp. 1988) that a signature is "any name, mark or sign written with the intent to authenticate any instrument or writing" because the language preceding that definition provides that "[T]he following definitions shall be observed, unless the definition would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute." Id. at §68-3-12(2). By allowing signatures in the body of a will, the legislature has implicitly approved "authenticating" the writing following a signature in the body of a will.

2. The Decedent's Subsequent Dating Of The Holographic Document Adopted The Handwritten Name As A Signature.

In addition to the language in the exordium, the decedent dated the holographic document after it was written, thereby acknowledging and adopting the handwritten name in the exordium clause as his signature. The subsequent dating of the will indicates that Mr. Erickson had completed the will and done everything he intended to do. Case law supports the concept of a person "adopting" a prior handwritten name as a signature. In In re Kinney's Estate, 16 Cal.2d 50, 104 P.2d 782 (1940), the court found the signature adopted based on the will being "complete." The court said that a will was not complete if it appeared from the instrument that the decedent had not "done everything they intended to do." See also Estate of McCarty, 2[illegible] Cal. Rptr. 94, 211 Cal. App.2d 23 (1962) (signature adopted by underlining at later date).

3. Decedent's Intent That The Handwritten Name Be His Signature Can Be Inferred From The Existence of Testamentary Intent.

The Court of Appeals' Opinion reads into the statute specific intent requirement that the testator's handwritten name be "written with the intent that it operate as an authentication of the document as a will" to accompany the general intent requirement that testamentary intent be present. Erickson, 7[illegible] P.2d at 1088. Reaching the conclusion that a person intended entire document, including the handwritten name, to be a will, but that the will is invalid because no specific intent to sign the will is shown, is a conclusion that defies the purpose of the UPC to validate wills whenever possible. If the handwritten name m[illegible]

be placed in the will with the specific intent of authenticating the completed document as a will, then the existence of testamentary intent should allow an inference to be drawn that a name written in the body of the will was done with the intent that it be a signature and authenticate the document. The trial court found the existence of testamentary intent regarding the holographic document at issue, based on extrinsic evidence as well as the document itself. That testamentary intent infers the existence of the decedent's intent that his handwritten name was placed in exordium clause to authenticate the will, especially in light of the surrounding language in the exordium clause.

4. The Form Of The Holographic Document Does Not Negate The Decedent's Signatory Intent.

The Court of Appeals' Opinion addresses several aspects of the holographic document which should bear no weight as to either the issue of whether the will contains a signature or the issue of testamentary intent. The fact that the will is written on the unlined side of index cards does not in any way imply a lack of either intent to sign or testamentary intent. The relevant inquiry is what was written, not the material which contains the writing. The Utah Court of Appeals has recognized that immaterial language on pre-printed forms can be ignored in validating holographic wills. Estate of Fitzgerald, 738 P.2d 236 (Utah Ct. App. 1987). In the same manner, the use of the lined or the unlined side of the cards is irrelevant.

The fact that the index cards are not attached to each other has no bearing on signatory intent or testamentary intent. This Court addressed that issue in In re Love's Estate, 75 Utah 342, 285 P.299 (1930), stating that several loose or detached sheets may serve as a will if, as is the present case, the sheets can be coherently read together as a will and contain nothing out of harmony with the general conception of a will. The present holographic document meets that standard.

The Court of Appeals stated in its Opinion that the nature of the holographic document suggests that it was unfinished or constituted a draft. By allowing laymen to prepare holographic wills, the Utah statute sets a priority on carrying out the testator's intent rather than on the form of the instrument. Admittedly, the holographic document at issue is crude, but that crudeness does not bear on the requisites for a valid holographic will. The fact that the first card was subsequently dated indicates that the will was completed. Nothing in the holographic document indicates that the decedent intended to take any further action to complete the will. The mere fact that the decedent could have disposed of additional property if he chose to do so does not support a conclusion that the will is incomplete especially where decedent's prior will is not revoked by the holographic document at issue. Even if the holographic document was not completed, however, the broad purpose of the UUPC to validate wills whenever possible should support validating a will which otherwise meets the statutory requirements. In the prese

case, the clear language of the exordium clause and the subsequent dating are far better evidence of the testator's intent to sign the will than the rough nature of the documents.

In regard to the possibility that the cards were a "draft," an intent to later prepare a more formal document does not preclude or detract from the testator's intent in regard to an earlier document. In re Kutter's Estate, 160 Cal. App.2d 322, 325, P.2d 624, 631 (1958); Richberg v. Robbins, 33 Tenn. App. 66, 228 S.W.2d 1019, 1022 (1950); In re Estate of Teubert, 298 S.E.2d 456, 461 (W.Va. 1982).

B. THE COURT OF APPEALS IMPROPERLY REVERSED THE TRIAL COURT BASED ON AN ISSUE NOT RAISED ON APPEAL.

The personal representative did not raise the issue at trial or on appeal of whether the decedent intended his handwritten name to be his "signature." As stated by the Court of Appeals in its Opinion in this case, "the parties and the court below seem to have focused on the broader issue of whether decedent intended these cards to be his will...," Erickson, 766 P.2d at 1087, and "[T]he findings and conclusions entered by the trial court, as well as the appellate briefs for both parties, fail to distinguish intent for these two different purposes." Id. at 1087 fn. 2.

At the trial, the Personal Representative of the Estate, the Appellant herein, raised only the issue that testamentary intent did not exist regarding the will. (R-128-175). See specifically the Personal Representative's argument for dismissal following Mr. Misaka's evidence (R 147-150) and closing argument (R 171-173).

In arguing that testamentary intent was lacking, the Personal Representative did cite In re Bloch's Estate, 39 Cal.2d 570, 248 P.2d 21 (1952) regarding affixing the signature with intent to authenticate (R-148), but did so only as part of his argument that testamentary intent was lacking. Bloch's Estate's broad holding finding an intent to sign where the handwritten name was used in describing property of the decedent actually supports a finding of an intent to sign in the present case. Further, while the issue of intent to sign was also addressed in the Personal Representative's discussion of points (R 106-111), that document was filed some 17 days after trial and 12 days after the Court's Order (R 104), and contained no legal authority on the issue except a citation to 19 A.L.R.2d 926. The Personal Representative's brief filed with the Court of Appeals addressed directly only the issue of testamentary intent, while in that discussion addressing intent to authenticate as part of that overall testamentary intent.

While it is proper for a court on appeal to affirm based on grounds not raised at the trial level, see Branch v. Wester Petroleum, Inc., 657 P.2d 267, 276 (Utah 1982), this Court has repeatedly held that an issue will not be considered for the first time on appeal in cases where the new issue is raised to reverse the trial court's decision. See, e.g., Traynor v. Cushing, 68 P.2d 856, 857 (Utah 1984). As the Court of Appeals stated James v. Preston, 746 P.2d 799 (Utah App. 1987):

> "Theories or issues which are not apparent or reasonably discernable from the pleadings,

> affidavits, and exhibits will not be considered." Minnehoma Fin. Co. v. Pauli, 565 P.2d 835, 838 (Wyo. 1977). In particular, even if pleadings are generously interpreted, if they are not supported by any factual showing or by the submission of legal authority, they are not presented for decision.

In the present case, the Personal Representative's failure to clearly raise the issue of whether the decedent intended his handwritten name to be his signature falls within the perimeters of James v. Preston, and should not have been considered by the Court of Appeals on appeal.

POINT II

THE COURT OF APPEALS HAS RENDERED AN IMPORTANT DECISION OF STATE LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

As recognized by the Court of Appeals, the issue presented in this case of the requirements of a signature in the body of a holographic will is one of first impression in Utah. Erickson, 766 P.2d at 1086 fn.1. While the issue has been addressed in many other jurisdictions, see Annot., 19 A.L.R.2d 926 (1951), the Court in In re Fegley, 42 Colo. App. 47, 589 P.2d 80 (1978) is the only court to have addressed the issue in a jurisdiction which has adopted the Uniform Probate Code. The issue in the present case is important in the context of the UUPC and its stated intent to "validate wills whenever possible," Editorial Board Comment to the Uniform Probate Code, General Comment to Part 5, and to "validate wills that meet the minimum formalities of the statute." Id., Comment to Section 2-502. The likelihood of laymen succeeding in

carrying out their intended testamentary disposition will be significantly reduced if the Court of Appeals' Decision is allowed to stand. It is unlikely that any holographic will would contain any language in the will itself indicating an intent to sign significantly clearer than the language in the present holographic document. Therefore, this case is important in determining whether the legislative intent to allow wills to be signed in the body of the document will be given real meaning, or whether it will be allowed in name only, subject to a standard of proof regarding intent to sign which is effectively unmeetable. As the California Supreme Court stated in Estate of Black, 641 P.2d 754 (1982), the California Supreme Court stated:

> If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt, upon purely technical reasoning, a construction which would result in invalidating such wills in half the cases.

WHEREFORE, Petitioner, Tatsumi Misaka, prays that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted this 7th day of March, 1989.

WATKISS & CAMPBELL

KEN P. JONES
Attorneys for Respondent,
Tatsumi Misaka

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four (4) copies of the foregoing Petition for Writ of Certiorari were caused to be hand-delivered upon Randy S. Ludlow, Attorney for Respondent, 311 South State Street, Suite 280, Salt Lake City, Utah 84111, this 27th day of March, 1989.

WATKISS & CAMPBELL

KEN P. JONES
Attorneys for Respondent,
Tatsumi Misaka

APPENDIX

1. Copy of Court of Appeals' Decision, Estate of Erickson v. Misaka, 766 P.2d 1085 (Utah App. 1988).

2. Copy of Utah State Court of Appeals' Order Denying Rehearing dated January 26, 1989.

3. Copy of the Holographic Will of Robert E. Erickson.

APPENDIX 1

In the Matter of the ESTATE OF Robert E. ERICKSON, Deceased, Appellant,

v.

Tatsumi MISAKA, Respondent.

No. 880139–CA.

Court of Appeals of Utah.

Dec. 23, 1988.

A petition for probate of three handwritten three-inch by five-inch cards as decedent's holographic will was filed. The Third District Court, Salt Lake County, John A. Rokich, J., admitted the cards to probate, and personal representative appealed. The Court of Appeals, Jackson, J., held that there was no evidence that decedent's name was written in the introductory clause on one card with the intent that it constitute authentication of one or all of the cards as a will

Final judgment and order vacated.

1. Wills ⇐133

Decedent's intent is crucial factor in determining whether purported holographic will has been signed within meaning of statute pertaining to execution of wills. U.C.A.1953, 75–2–503.

2. Wills ⇐130, 131

Although statutory requirements for execution of valid holographic wills are minimal, statute is mandatory and not directory, holographic document is invalid as will-despite deceased's clear intent that document will be will-unless document complies with governing statute U C.A.1953, 75–2–503.

3. Wills ⇐133

Decedent's handwritten name in body of purported holographic will is not, by itself, prima facie evidence that document contains decedent's signature; handwritten name must have been written with intent that it operate as authentication of document as will in order for it to be signature. U.C.A.1953, 68–3–12(2)(r), 75–2–503.

4. Wills ⇐133

Three handwritten three-inch by five-inch cards were inadmissible as holograph will despite fact that decedent's name was written in introductory clause on one card; there was no evidence that decedent's name was written with intent that it constitute authentication of one or all of cards as will. U.C.A.1953, 75–2–503.

5. Wills ⇐133

It is possible for handwritten name at beginning of body of will to be written with intent that it be requisite signature, but there must be support in evidence for that intent.

Randy S. Ludlow (argued), Salt Lake City, for appellant.

Herschell J. Saperstein, Ken P. Jones (argued), Watkiss and Campbell, Salt Lake City, for respondent.

Before GARFF, BILLINGS and JACKSON, JJ.

JACKSON, Judge:

Robert E. Erickson died in June 1983. His formal will, executed June 9, 1955, was admitted to probate in July 1983 and the designated personal representative appointed. In October 1985, respondent Tatsumi Misaka filed a petition for probate of three handwritten 3" × 5" cards as Erickson's holographic will. In this appeal, the personal representative challenges the trial court's admission of the cards to probate. Because we conclude there is insufficient evidence that Erickson intended his handwritten name on one of the cards to be his signature for purposes of Utah Code Ann. § 75–2–503 (1978), we vacate the final order and judgment below.

[1] The right to dispose of property by will is governed and controlled by statute. *In re Wolcott's Estate*, 54 Utah 165, 180 P. 169 (1919). The introductory Editorial Board Comment to Part 5 of the Utah Uniform Probate Code,[1] Utah Code Ann. §§ 75–2–501 through –513 (1978), notes that its provisions are intended to validate a will whenever possible. This goal is achieved, in part, by keeping the formalities for a written and attested will to a minimum, *see* section 75–2–502, and by authorizing holographic wills written and signed by the testator:

> A will which does not comply with section 75–2–502 [requiring, among other things, the signatures of two witnesses] is valid as a holographic will, whether or not witnessed, if *the signature and the material provisions* are in the handwriting of the testator....

Utah Code Ann. § 75–2–503 (1978) (emphasis added). As the Editorial Board Comment to section 75–2–502 makes clear, the requisite signature need not be at the end of a will. If the testator "writes his name in the body of the will and *intends it to be his signature*, this would satisfy the statute." (Emphasis added.) Thus, the decedent's intent is the crucial factor in determining whether a purported holographic will has been signed within the meaning of section 75–2–503. *See In re Estate of Fegley*, 42 Colo.App. 47, 589 P.2d 80, 81 (1978) (construing identical statute).

[2] Although the statutory requirements for execution of a valid holographic will are minimal, the statute is mandatory and not directory. A holographic document is invalid as a will—despite the deceased's clear intent that the document be a will—unless the document complies with the governing statute. *In Re Wolcott's Estate*, 180 P. at 170 (decided under prior statute requiring holographic will to be entirely written, dated, and signed by testa-

1. The issue presented in this appeal in one of first impression in this state. Utah is one of sixteen states to adopt all or part of the Uniform Probate Code since 1972. See Utah Code Ann. §§ 75–1–101 to 75–8–101 (1978) (effective July 1, 1977). The others are: Alaska (1973); Arizona (1974); Colorado (1974); Florida (1975); Hawaii (1976); Idaho (1972); Kentucky (1976) (only Art. VII, Part 1); Maine (1981); Michigan (1979); Minnesota (1975); Montana (1975); Nebraska (1977); New Mexico (1976); North Dakota (1975); and South Carolina (1987). Due to the recency of adoption by only a small minority of states, there is a dearth of case law construing the provisions of the Uniform Probate Code.

tor). *See* 2 *Page on the Law of Wills* § 20.4 (W. Bowe & D. Parker ed. 1960).

Under Utah Code Ann. § 75-3-407 (1978), proponents of wills in contested cases always have the burden of establishing prima facie proof of their due execution, while contestants bear the burden of establishing lack of testamentary intent. *See In re Estate of Olschansky*, 735 P.2d 927, 929 (1987).

> The proof in support of probate must be sufficient to convince the court that the paper produced is the lawful will of the testator.
>
> A prima facie case is made when it is shown that all the requirements of law have been observed in the execution of the will, and unless such prima facie case is made the court should refuse probate even where probate is not contested. G. Thompson, *The Law of Wills*, 3rd Ed., § 199.

In re Estate of Craddock, 179 Mont. 74, 586 P.2d 292, 294 (1978) (proponent failed to establish prima facie case that purported holographic will was written entirely by testator, as required by statute).

Applying these principles to the instant case, it was respondent Misaka's burden to make a prima facie showing that the purported holographic will contained the "signature" required by section 75-2-503. On this issue, respondent introduced only the three unnumbered and unattached cards, which were apparently discovered in a desk drawer along with other belongings of decedent. They read as follows, with unreadable portions indicated:

> 8/22/73 Last Will + Test I Robert E. Erickson do hereby state that I leave and bequeath to the following persons of my family + others on my demise I want to leave to my wife Dorothy Erickson the home at 1378 Blaine Ave until she remarries, after which the home shall be sold + ½ go to her + ¼ to REE Jr + ¼ to Sheryl Ann Erickson
>
> the F H Store shall go ¼ to Dorothy ¼ to REE Jr ¼ to Sheryl [unreadable] the other ¼ is owned by T Misaka The condominium at Park City is to go To ¼ REE Jr ¼ to Sheryl + ½ T T [Madaka or Masaka] My Interest in Nevada Scratch to Go to Dorothy in Total
>
> My Insurance to cover my interest in the Holladay store to go to Dorothy in Total—$50,000 or more. other stock interests—Some Zions Utah Bank [Craft or Croft] to go To Sheryl + Bobby Share + Share alike

On the basis of these writings, respondent Misaka is claiming a one-half interest in Erickson's Park City condominium. Without admission of the index cards to probate as a valid holographic will, Misaka takes nothing; the distribution of the property is controlled by the terms of Erickson's formal 1955 will.

Although the parties and the court below seem to have focused on the broader issue of whether decedent intended these cards to be a will, the relevant inquiry is whether the evidence is sufficient to show decedent Erickson intended that his handwritten name near the top one of the cards be his signature.[2] Misaka offered no evidence extrinsic to the cards themselves as proof of Erickson's intent. The trial court concluded the three index cards contained the "signature" required by section 75-2-503 for a valid holographic will, without specifying the particulars in the three cards relied on to implicitly find that Erickson intended his handwritten name to be his signature. This determination of the decedent's intent, based solely on the trial court's examination of the purported will, is a matter of law, *see In re Love's Estate*, 75 Utah 342, 285 P 299 (1930), which we review on appeal under a correction-of-error standard. *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1378 (Utah 1987).

[3] In the definitions provided by the legislature to guide construction of Utah

2. The findings and conclusions entered by the trial court, as well as the appellate briefs of both parties, fail to distinguish "intent" for these two different purposes. The distinction is pointed out in Note, *Wills—Validity of Signature for Holographic Wills*, 28 Ark.L.Rev 521 (1975), discussing *Nelson v. Texarkana Historical Soc'y and Museum*, 257 Ark. 394, 516 S.W.2d 882 (1974), and *Smi[illegible] v. MacDonald*, 252 Ark. 931, 481 S.W.2d 741 (1972). In *Nelson*, as in this case, the evidence extrinsic to the purported will itself went only to the question of general testamentary intent, i.e., did the decedent intend the writing to be a will, not to whether she intended her name in the body of the instrument to be her signature. *Nelson*, 257 Ark. at 398, 516 S.W.2d at 884.

statute, "signature" is defined as including "any name, mark, or sign written with the intent to authenticate any instrument or writing." Utah Code Ann. § 68-3-12(2)(r) (1988). A decedent's handwritten name in the body of the purported holographic will is not, by itself, prima facie evidence that the document contains the decedent's signature. In the context of section 75-2-503, such a handwritten name must have been written with the intent that it operate as an authentication of the document as a will in order for it to be a signature. The purpose of our statutory scheme is to require a course of conduct which assures that a person's will is reduced to writing and, when handwritten, that the intention to have the writing take legal effect be indicated by a signature which records that fact. The signature requirement shows that the writer finally approved the writing and meant for it to be operative as a testamentary instrument. *See* Mechem, *The Rule in Lemayne v Stanley*, 29 Mich.L.Rev. 685, 690-96 (1931)

[4] Our review of the purported holographic will in this case leads us to conclude that it does not contain the signature required by the statute before it can be admitted to probate. The three cards in evidence are index cards on which only the unlined sides have been written. They were not attached to each other. There is no concluding language on any of the cards, and they otherwise give no indication that they are, taken together, a completed document. Indeed, the nature of the note cards, the use of abbreviations, lack of punctuation, and the perfunctory, open-ended wording strongly suggest that the cards, as a document, are unfinished or constitute a draft.

Although the handwritten name of the decedent appears in the phrase "I Robert E. Erickson do hereby state," the writing contains nothing indicating the name was intended as the required executing signature. There is nothing on the face of the cards to affirmatively or by necessary implication suggest that decedent wrote his name for any other purpose than to identify himself as the writer *See In re Bernard's Estate*, 197 Cal. 36, 239 P 404 (1925); *see generally*, Annotation, *Place of Signature of Holographic Wills*, 19 A.L.R.2d 926, 939-44 (1951). In short, there is no evidence that decedent's name was written in the introductory clause on one card with the intent that it constitute authentication of one or all of the cards as a will. Respondent, therefore, failed to make a prima facie showing that the purported holographic will contained the authenticating signature required by section 75-2-503.

[5] It is, of course, possible for a handwritten name at the beginning of the body of a will to be written with the intent that it be the requisite signature.[3] However, there must be support in the evidence for that intent. Standing alone, it is equivocal, leaving the decedent's final approval and authentication of the writing in doubt. Without more, it is an inadequate guard against writing being deleted, a possibility in this case if additional cards were written upon by Erickson only to be lost, misplaced, or discarded by him or others.

The final judgment and order of the trial court admitting the cards to probate as decedent's holographic will is vacated. Costs to appellant.

GARFF and BILLINGS, JJ., concur

3. *E.g., Smith v. MacDonald*, 252 Ark. 931, 481 S.W.2d 741 (1972) (handwritten name in title and exordium clause constitutes signature required by statute); *In re Estate of Glass*, 165 Cal.App.2d 380, 331 P.2d 1045 (1958) (handwritten name in heading of document, "This is Louis R. Glass"); *Burton v Bell*, 380 S.W.2d 561 (Tex.1964) (handwritten name in exordium clause, "That I, Roy Wheeler Bell, ," is signature required for holographic will) *But see In re Bernard's Estate*, 197 Cal. 36, 239 P 404 (1925) (no intent that name in exordium be signature where document terminated abruptly after a specific bequest), *Estate of Fegley*, 42 Colo.App. 47, 589 P.2d 80 (1978) (phrase at end of instrument "witness my hand " followed by blank signature space indicates decedent intended to sign later and did not intend handwritten name in exordium clause to be her signature), *Davis v Davis*, 86 Okla. 255, 207 P. 1065 (1922) (same phrase and result as *Fegley*)

APPENDIX 2

UTAH STATE COURT OF APPEALS

In the Matter of the Estate of Robert E. Erickson, Deceased, Appellant, v. Tatsumi Misaka, Respondent.	)	ORDER No. 880139-CA

This matter is before the Court upon a Petition for Rehearing filed by the respondent, Tatsumi Misaka.

IT IS HEREBY ORDERED that the respondent's petition for rehearing is denied.

Dated this 26th day of January, 1989.

FOR THE COURT:

Mary T. Noonan
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that on 27, January 1989 I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

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DATED this 27th day of January, 1989.

By Kathleen Flynn
Kathleen Flynn
Case Management Clerk

P-83-583

10-17-85

FILED

FILED IN CLERK'S OFFICE
Salt Lake County Utah

OCT 15 1985

H. Dixon Hindley, Clerk
By Muriel Heywood
Deputy Clerk

10-3

(staple mark)

PLAINTIFF'S EXHIBIT
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